IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-910

Calvin Sims, Richard Allen, Frank Rogers, Billy Lee Williams, Walter Lee, Boyd Slager, Peter George Mills, Lee D. Walker, Clemont Dedeaux, Ordell Vilburn, William Cleary, Herbert Williams, Fred Holnagel, Benny Spells, Kenneth Inman, Raymond L. Bailey, Orcean Davis, Jerry Mack, Boyd Kelton, Thomas H. Lord, Ralph Watson, Chester A. Sawicki, Phillip McGhee, Vernon D. Mevis, Ralph R. Warner, Ronald D. Kennedy, Paul Ross, Herman Head, Gerald G. Norman, Paul Miller, Thomas U. Mulligan, Lonnie Payne, Robert Mason, Gaylord L. Espich and Kenneth R. Marshall,

Petitioners,

v.

Parke, Davis & Co., a Michigan corporation, The Upjohn Co., a Delaware corporation, Department of Corrections of the State of Michigan, Eleanor Hutzel, James E. Wadsworth, Ernest C. Brooks, Max Biber, C. J. Farley, John W. Rice, Duane L. Waters, Florence Crane, Joseph J. Gross, G. Robert Cotton and Gus Harrison,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR ALL RESPONDENTS

(For Attorneys, See Inside Front Cover)

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COUNTER-STATEMENT OF QUESTIONS PRESENTED*

I. Was Respondents' Motion for Summary Judgment on Count I correctly granted because uncontroverted facts established that the inmates were not "employees" of Respondent drug companies within the meaning of the Fair Labor Standards Act?

II. Was Respondents' Motion for Summary Judgment on Count II correctly granted because the uncontroverted facts established that the inmates were not "employees" of Respondent drug companies within the meaning of the Michigan Minimum Wage Law?

III. Was Respondents' Motion for Summary Judgment on Count III correctly granted because these lawfully confined prison inmates do not have a private cause of action for damages by reason of their work assignment to research clinics located within the prison walls, allegedly in violation of a Michigan statute designed to protect free labor from competition by prison labor?

IV. Was Respondents' Motion for Summary Judgment on Count IV correctly granted because, even assuming that the utilization of the inmates' labor was contrary to Michigan law, they suffered no denial of any rights protected by the United States Constitution?

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* The procedural question arising under Fed.R.Civ.P. 23(a) is not discussed in this Brief because the District Court's granting of Summary Judgment on the merits on all counts of the Complaint rendered the class action issue moot.

COUNTER-STATEMENT OF THE CASE

For purposes of the Petition only, Respondents accept Petitioners' Statement of the Case. In addition, however, the following uncontroverted facts are relevant to the issues presented.

The research conducted at the clinics consists of very carefully planned and supervised testing of drugs, as required by the Federal Food and Drug Administration. Only inmates who volunteer and who are in excellent physical condition are accepted for the test programs. These inmate volunteers are not involved in this proceeding.

The test programs are developed and monitored by highly experienced medical and technical personnel of the Respondent drug companies. The tests are actually run under the supervision of technical personnel of the drug companies who work at the clinics in Jackson Prison. The Michigan Corrections Commission has assigned prison inmates to work at the research clinics to perform various tasks ranging from common labor (*e.g.*, janitorial tasks) to semi-technical work (*e.g.*, clerical tasks, operating EEG machine). See *Business Week* 58-61 (June 27, 1964). (Appendix A). All petitioners are members of this latter group. The legality of the imprisonment and detention of the inmates involved has not been challenged.

The research facilities operated by Parke Davis and Upjohn are located within the walls of Jackson Prison and generally provide conditions superior to other prison assignments, because the facilities are relatively new. Inmates on clinic assignment enjoy special recreation facilities, at times better food, more freedom and more contact

with non-prison personnel than inmates on most other prison assignments. Assignment to the clinics, therefore, has been regarded by the inmates as highly desirable—in fact, inmates frequently requested assignment to the research clinics. On the other hand, many of the specific classifications in the clinics have been considered valuable, educational and rehabilatative opportunities by the State Corrections Commission.

Daily rates for assignment to the research facilities, which were paid by the Corrections Commission into the respective inmates' accounts, were established by the Corrections Commission and are somewhat higher than rates for comparable work on other prison assignments.

The actual assignment of each and every inmate to his respective tasks within Jackson Prison is made by the Prison Director of Treatment, acting with the assistance of the Classification Committee. Requests for certain named inmates have been made by Parke Davis and Upjohn; some were granted by the prison authorities and some were denied. Conversely, certain inmates have been assigned to the research clinics without the prior knowledge or approval of the clinic administrators while others have been removed without their prior knowledge or approval. Indeed, certain inmates have been assigned to research facility tasks and others have been removed against the express wishes of the clinic administrators.

Once an inmate was assigned to either the Parke Davis or Upjohn research facility, he was subject to call at any time by any prison official, his hours were subject to approval by prison authorities, and he could be given time off for various reasons by the prison authorities without the approval of the research clinic administrator. Specific instructions and tasks assigned by the research facilities could be and, in fact, were vetoed by the prison authorities.

In short, as noted in the opinion of the District Court, the day-to-day supervision by Parke Davis or Upjohn of inmates assigned to the research facilities was always subject to the overriding authority of prison officials, who frequently exercised their authority to disapprove the drug companies' instructions to inmates.

REASONS FOR DENYING THE WRIT

I.

The Decision Below Was Clearly Correct

This is an action by prison inmates who were assigned to work at research clinics within the prison walls, rather than to some other existing prison industry (for example, the laundry facility). The Petitioners claim that the wages set and paid by the State of Michigan, which are comparable to and, in fact, somewhat higher than the wages paid to fellow prisoners doing comparable work on other prison assignments, are insufficient and that they should be awarded damages measured on the basis of minimum wage rates, which would be significantly higher than the wages enjoyed by fellow prisoners working in other prison industries.

In Count I of the Amended Complaint, it is claimed that such higher wages are payable by reason of the applicability of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. Under the Fair Labor Standards Act, however, it must be determined whether an employment relationship exists, and the well-established test for this determination is one of "economic reality". *Goldberg* v. *Whitaker House Cooperative, Inc,* 366 U.S. 28 (1961). Petitioners do not challenge the propriety or adequacy of this test but claim

that the application of this test to the extensive, uncontroverted facts in the record in this case should have resulted in a contrary decision. The essential facts here are that Petitioners, inmates of a state prison in Michigan, were assigned by the prison officials to perform tasks in research clinics within the prison walls owned by the State of Michigan, but operated by Parke Davis and Upjohn. The drug companies routinely supervise the work activities of the assigned inmates while they are within the confines of the clinics. It is the State of Michigan, however, and *not* Respondent drug companies, which "hires" and "fires" the inmates (with respect to their assignment to the clinics), controls the particular tasks to be performed and the hours to be worked, determines time off by the inmates, determines the amount of compensation and pays the inmates, and at all times maintains full custodial control over them.

The law is clear. The facts are clear. Applying the law to the facts, the District Court came to the conclusion that there was no employment relationship between the drug companies and the prison inmates within the meaning of the Fair Labor Standards Act, and the Court of Appeals for the Sixth Circuit agreed. The conclusion reached is in accord with *Huntley* v. *Gunn Furniture Co.*, 79 F. Supp. 110 (W.D. Mich. 1948) and *Hudgins* v. *Hart et al.*, 323 F. Supp. 898 (E.D. La. 1971), the only two reported decisions squarely in point. It is further clearly in accord with economic reality and common sense, and presents no deviation from the legions of decided cases dealing with the applicability of the Fair Labor Standards Act to particular fact situations.

Count IV of the Amended Complaint purports to raise issues under the Fourteenth Amendment. It is submitted, however, that no constitutional questions exist in this case.

Petitioners are prison inmates assigned to perform certain tasks in the clinic buildings within the state prison at Jackson, Michigan (for example, prepare food in the clinic kitchen), rather than being assigned to perform tasks in some other prison industry within the prison (for example, prepare food in the general prison kitchen). The inmates assigned by the prison authorities to work at the clinics are paid by the prison authorities at rates which are the same or somewhat higher than the rates for comparable work on other prison assignments.

Nevertheless, Petitioners claim to be constitutionally entitled to higher wages, vastly disproportionate as compared to the wages of fellow inmates performing similar tasks in other prison industries. The basis of this argument is the claim that the application of ordinary tort principles to an alleged violation of a Michigan statute should result in the recovery of money damages on a quantum merit basis. That is theory of Count III of the Amended Complaint.

Petitioners have not claimed a Constitutional right not to work while validly confined in the state prison. They do, however, appear to claim that they have some vague constitutional right not to be required to perform any tasks which are alleged to be in violation of a state statute designed to protect free labor from competition by prison labor.

It is submitted that the District Court in this case correctly rejected this contention when it held:

> "Yet, merely because penal officials have treated state prisoners at variance with the applicable state law does not, in itself, constitute a violation of the due process or equal protection rights of those prisoners. That was the precise conclusion reached by the Courts of Appeal for the Eighth and Ninth Cir-

cuits in two decisions which we elect to follow. *Draper* v. *Rhay*, 315 F.2d 193, 197 (9th Cir. 1963); *Sigler* v. *Lowrie*, 404 F.2d 659, 662 (8th Cir. 1968). If the rule were otherwise, every erroneous decision on state law matters would come before the federal court as a Constitutional question. *Hughes* v. *Heinze*, 268 F.2d 865, 870 (9th Cir. 1959)".

II.

There Is No Important Question Of Federal Law Involved

Stripped of the attempted emotional appeal, including the irrelevant references to Attica and to prison rebellions and uprisings, it appears that the only reason set forth in support of Petitioners' application is that they are dissatisfied with the determination of the case in the lower courts.

It is claimed in the Petition that questions raised in connection with Counts I and IV of the Amended Complaint in this case are "important" and "novel". Respondents respectfully submit that the real questions at issue here are neither important nor novel, nor come within the ambit of Rule 19.1(b) and that the lower courts correctly disposed of them. It is significant that in the thirty-four years since the adoption of the Fair Labor Standards Act, only three reported decisions have involved prisoners, *Huntley* v. *Gunn Furniture Co., supra; Hudgins* v. *Hart, et al., supra*, and the instant proceeding. It is also significant that the District Courts in all three cases have reached the same conclusions for the same reasons, *i.e.*, no Fair Labor Standards Act coverage because no employment relationship existed under the facts presented. Petitioners have represented that the "arrangement present between the Michigan Department of Corrections and Parke Davis and Upjohn has counterparts elsewhere in the United States,

so that the decision herein will have wide application." Respondents respectfully represent that, to the best of their knowledge, the arrangement at the State Prison for Southern Michigan (described in Appendix A) is unique. The decisions by the courts below have extremely little significance and appear to have application to the parties to this litigation alone.

CONCLUSION

It is respectfully submitted that there are no proper reasons (within Rule 19 or otherwise) to support the Petition for Writ of Certiorari. The lower courts correctly disposed of the case by applying clear and well-established principles of law, and certiorari should be denied.

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February 11, 1972

New laboratories of Upjohn and Parke-Davis stand between prison hospital and Cell Block 9 at State Prison of Southern Michigan, in Jackson, Mich.

RESEARCH

Drug tests behind bars

Upjohn and Parke-Davis have broken precedent in building their own labs in huge Jackson (Mich.) prison, where they can run better clinical tests than ever before on new drugs

If you wanted to test a new drug on hundreds of human volunteers who have much the same sort of life and who can be continuously supervised for months or years, what better place to look than in a prison?

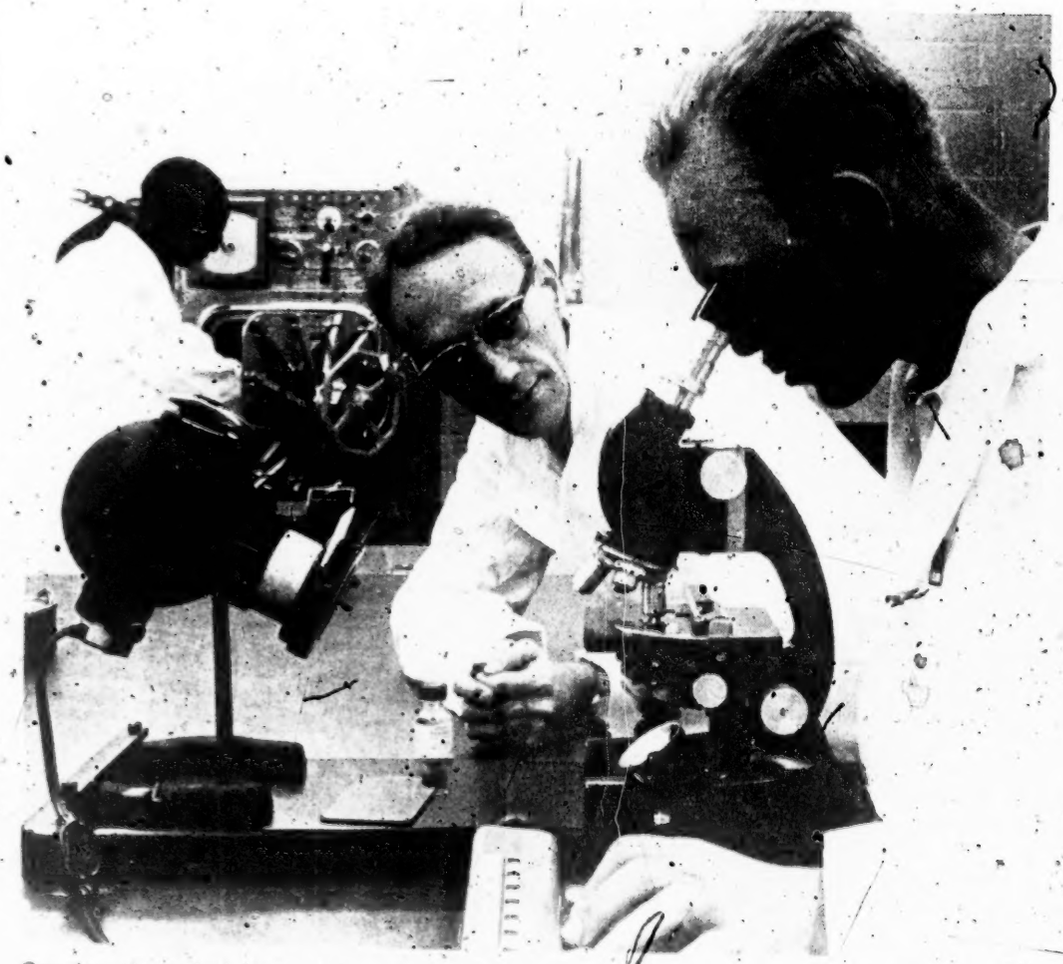
For many years, drug companies and the National Institutes of Health have had cooperative agreements with penal institutions all over the country, permitting them to run clinical tests on inmates. But they have generally been barred from installing labs at the institutions.

Now, Upjohn Co. and Parke, Davis & Co. have broken into prison in a big way, with half a million dollars' worth of lab facilities (pictures) at the State Prison of Southern Michigan. This prison, at Jackson, is rated as the world's largest walled penitentiary, enclosing 57 acres and 4,141 prisoners.

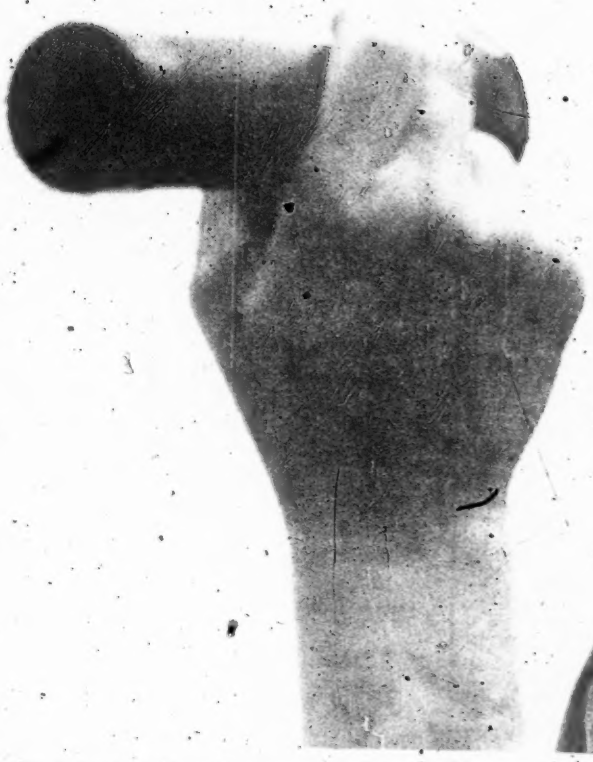
The two companies' laboratories, adjacent to the prison hospital, are said to be the first such facilities ever built by drug companies inside U. S. prison walls. They were completed this spring at a cost of $266,000 for Upjohn's labor and $226,000 for Parke-Davis, and title was then turned over to the state.

Research dream. From the outside, the two buildings, connected by a covered walk, aren't too impressive. Yet research people in both com-

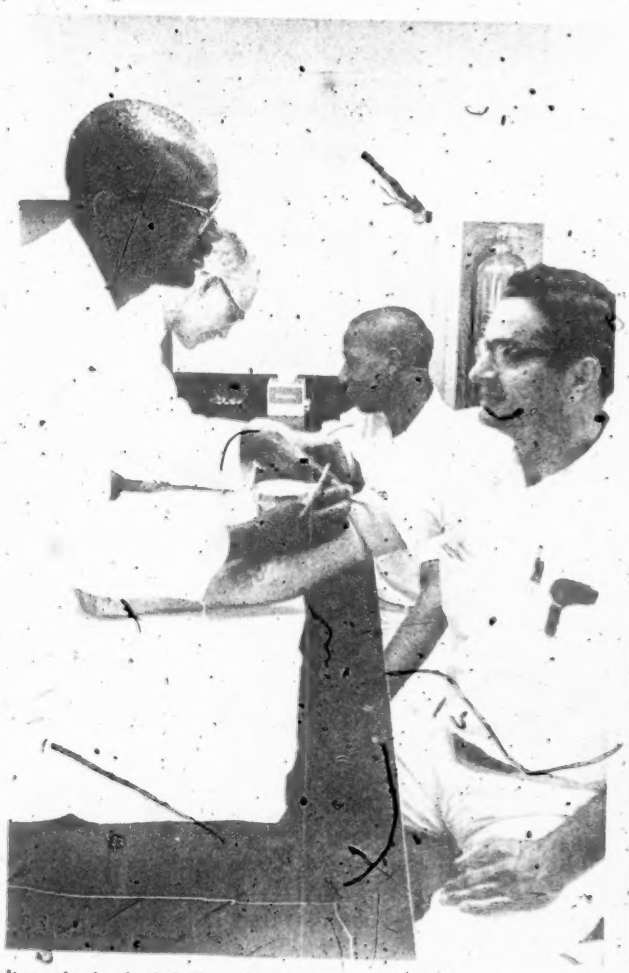
Prisoner's mouth is checked to be sure he



One inmate technician watches another counting blood cells. Inmates learn lab techniques; this gives them chance to gain skills useful in outside world.



swallowed pill. A tranquilizer, for example, can fetch two packs of cigarettes if it can be smuggled out to the yard



Inmate technicians take blood samples from prisoner volunteers in drug tests.

Guard checks volunteers into the waiting room of Upjohn's lab. Room seats 100 inmates, is made to look professional, cheerful.

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Gus Harrison, Michigan's director of corrections, pressed the lab idea

panies say the setup is a dream come true. It will permit, for the first time, what they call optimum control testing of new drugs.

The companies expect testing at Jackson to permit unsuitable drugs to be detected and discarded in as little as one month, compared with a standard three to five years for conventional clinical testing. They also expect far more accurate findings on how drugs affect cells and enzymes. The groundwork for a cure for the common cold or for cancer might well be laid at Jackson.

Drugs these days are accomplishing remarkable results partly because they are so much more powerful and so specifically formulated for their tasks. But as their potency increases, so does their inherent risk. Thus, accurate testing on human volunteers is ever more vital.

Personnel problem. It is also increasingly difficult to find enough volunteers—or even enough clinical investigators to test all the new drugs coming out of the laboratory.

With the spread of medical insurance, charity wards in hospitals are disappearing. These were traditionally an area for studies of new drugs as well as for the teaching of medical students. Drug tests can still be run in many private clinics in foreign countries, but companies admit a risk of inadequate controls and of a political backlash.

Through doctors who are prepared for clinical investigations, tests can also be run on patients all over the country, though it's a slower process than with prison volunteers and requires more contact work. There is a severe shortage of top researchers for routine testing jobs.

"There are a lot of doctors who are superb doctors," says Dr. Harold L. Upjohn, Upjohn's director of clinical research. "But they do not have the time, the knowledge (although they do not know it), or the patients to test drugs adequately."

Yet the drug companies must respond to the strict 1963 amendments to the Food, Drug & Cosmetics Act that empower the Food & Drug Administration to require a fuller accounting on all drug testing.

Finding an answer. Many a clinical test of a new drug turns up an aberrant finding that leaves the drug researchers uneasy even after the drug has been licensed. It might be a freakish reaction to a compound, a genuine effect of the drug, or a technician's sloppiness.

"We can never erase doubt in our own minds," a technician says. The prison labs are a step toward eliminating such doubts.

At Jackson, with laboratory facilities now available for substantial expansion of the testing program, Upjohn and Parke, Davis are tapping a rich source of volunteers for round-the-clock experiments under round-the-clock supervision. Prisoners are volunteering by the hundreds for testing purposes.

Willing, help. Many want the money, which ranges from a few cents to as much as $15 a day on a scale set by the prison board. Some are saving up for their parole period when a small bankroll can mean the difference—as it did for one prisoner recently, between getting out or being kept in prison for lack of a job or friends outside. Some send money to their families, too.

Prisoners also get a valuable feeling of self-respect. For some, it is the first time they have ever done anything to benefit society, some even

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learn the trade of lab technician, with a chance to find an honest job in a hospital later.

"I'm helping other people," says one inmate technician, "and I've never felt like this in my life."

Selling the idea. Testing of drugs in U.S. prisons dates back to 1906, when Pres. Theodore Roosevelt pressed for the first food and drug controls. It increased during World War II. Parke-Davis has been testing at Jackson prison for 30 years, Upjohn for eight.

Three years ago, Dr. Harold Upjohn broached the idea of company laboratories at the prison to Gus Harrison, director of the Michigan Board of Corrections. He and Harrison took the idea to the Prison Commission with the argument that research labs could be considered an extension of prison work shops and other activities geared to rehabilitation of prisoners.

The commission approved, and the state issued invitations to other Michigan drug companies to participate in the project. Parke-Davis accepted.

How it works. Under their agreement with the prison board, the companies are training inmates to run the tests that can be handled in the prison labs. Other tests are completed in their respective headquarters facilities, Parke-Davis in Ann Arbor and Upjohn at Kalamazoo.

The Board of Corrections decides which drugs may be tested at the prison. Each case is reviewed by a board of five doctors and a blue-ribbon committee, that includes the deans of the state's medical schools. Right now, the two companies are testing a broad range of drugs at Jackson, including anti-coagulants, analgesics, anesthetics, steroids, tranquilizers, and deodorants.

With their new ability to keep close laboratory controls on tests with prisoners, Parke-Davis and Upjohn expect soon to start testing drugs that have never been tried on human subjects. Tests at the prison are designed primarily to measure the toxicity of a drug, rather than its efficacy.

Initial doses are as low as 1/10000th of LD 50 (the lethal dose for 50 out of 100 laboratory animals, adjusted to man's weight). They are then built up gradually, to the point where adverse reactions appear.

Much faster. At Jackson, a large number of persons can be run quickly through the early stages of toxicity testing, revealing the specific reactions that must be explored. In the past, much of a researcher's time in checking on the toxicity of

Each volunteer gets a physical, and about half are eliminated from testing.

a new drug had to be spent in running around the country, coordinating clinical investigators.

"We're willing to stick our necks out on an unsuitable drug in a month now," says a Parke-Davis researcher. The Jackson project is hailed by Dr. P.F.R. de Caires, Parke-Davis director of clinical investigation, as a great aid to speed and accuracy in pinning down the areas for further study.

Since the lab opened, Parke-Davis has already eliminated two new chemicals designed to reduce blood cholesterol level.

Deeper, too. Dr. Upjohn is particularly interested in depth studies of a drug's reaction on a given prisoner, revealing basic facts about drugs generally. Upjohn is stressing two 10-bed metabolic wards at its lab for near-absolute control in drug studies that may last three or four days or several months at a time.

These studies will attempt to chart blood level, absorption and excretion of drugs, as well as toxicity, in selected healthy men. This is the element that is missing in many drug tests elsewhere.

"How can you tell when you test whole wards of little old ladies with broken hips if their reaction to a drug will be the same as that of a 17-year-old girl?" asks Dr. Alan Varley, manager of clinical research for Upjohn.

With prisoners, researchers can precisely set the odds in drug tests. "You can devote your entire attention to safety," says Varley, "and learn considerably more about a drug."

In the outside world, test subjects balk drug researchers at every turn, albeit unintentionally. "People are not reliable when they are asked to take medicine," Dr. Upjohn says. In a prison setup, they can be checked to be sure they have followed instructions precisely. **End**